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IN THE

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA

Respondent

v.

EARL LAVELL FAIRCLOTH,
GERALD E. MICHAEL,
and LATEN GENE REAVES

Petitioner

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COUNSEL LISTED ON INSIDE COVER

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QUESTIONS PRESENTED FOR REVIEW

I. Are co-defendants represented by the same retained counsel and charged with conspiracy entitled to a new trial when the trial court fails to conduct an inquiry with respect to the joint representation of the co-defendants as mandated by F.R. Cr. P. 44(c)?

II. Whether the evidence is sufficient to support the conviction of the defendants for importation of methaqualone when the conviction is based upon evidence less probative than evidence previously held insufficient to support convictions for importation in both the Fifth and Ninth Circuits?

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JURISDICTIONAL STATEMENT

This petition is from a 27 May 1982 affirmance by the United States Court of Appeals for the Fourth Circuit of a conviction in Federal District Court. The Fourth Circuit decision is appended to this petition. Jurisdiction is granted by 28 U.S.C. 1254(1). Petition to rehear was denied on 29 July 1982.

AUTHORITIES, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AUTHORITIES:

Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708 (1980). 16

Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457 (1942). 16

Jackson v Virginia, 443 U.S. 307, 99 S. Ct. 2781, (1979) 21

United States v. Carrigan, 543 F.2d 1053 (2nd Cir. 1976). 14

United States v. Carrion, 457 F.2d 200 (9th Cir. 1972). 24

Unites States v. Foto, 591 F.2d 1091 (5th Cir. 1979). 24

United States v. Lauriw, 568 F.2d 98 (8th Cir. 1977). 16

United States v.Maslanka, 501 F.2d 1091 (5th Cir. 1979). 24

United States v. Meyer, 432 F.2d 1000 (9th Cir. 1970). 23

UNITED STATES CONSTITUTION:

> Amend. VI: In all criminal prosecutions, the accused shall...have the Assistance of Counsel for his defense.

STATUTES:

> F.R. Cr. P. 44(c)
>
> Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

21 U.S.C. 952(a) (See appendix for text)

STATEMENT OF THE CASE

Laten Gene Reaves, Earl Lavell Faircloth, and Gerald E. Michael are the petitioners herein and will be referred to in this petition as "defendants". Defendants and others were convicted in United States District Court for the Eastern District of North Carolina for conspiracy to import and to possess with intent to distribute methaqualone and marijuana, importation and aiding and abetting the importation of methaqualone (quaaludes), and the importation and aiding and abetting the importation of marijuana, however, the defendant Hu Chang, who was the alleged pilot of the airplane carrying contraband, was acquitted on the conspiracy charge. These petitioners appealed their

convictions to the United States Court of Appeals for the Fourth Circuit. That Court affirmed in part, but reversed the convictions for importation of marijuana for lack of evidence that the marijuana was imported from a place outside the United States.

The relevant facts for consideration of the first question presented in this petition are quite terse. Roger Suggs and Laten Gene Reaves were both represented by the same privately retained attorney during the pretrial and trial stages of this case. Trial commenced on 23 February 1981, some thirteen months after the effective date of F.R. Cr. P. 44(c). It is readily admitted and apparent from the record that no inquiry was made by the district court with

respect to the joint representation of the two defendants. Further, neither defendant was personally advised of his right to separate representation at any stage of the proceedings.

The relevant facts of the second question posed in this petition focus upon the second count in the indictment alleging the defendants violated federal law by engaging in the importation of methaqualone. Both the marijuana and the methaqualone were found in a Lodestar plane at the Long Beach Airport. The Court of Appeals for the Fourth Circuit reversed the convictions for importation of marijuana but upheld the convictions for the importation of methaqualone. Evidence submitted to the jury on the issues of importation of

methaqualone and the importation of marijuana was virtually identical with the exception of the testimony of a forensic chemist, Edward Franzosa of the Drug Enforcement Administration. He testified over proper objection that the methaqualone tablets seized in this case were manufactured by the same stamping machine which manufactured a methaqualone tablet previously sent to the Drug Enforcement Administration laboratory in 1979 by a DEA agent in Colombia. No evidence indicated the DEA agent in Colombia seized the stamping machine or the sample from a clandestine drug operation in Colombia or anywhere else outside the United States. Rather, the DEA agent received the sample from a police officer in Colombia and no one knows where

the officer obtained the sample tablet or where it was manufactured. There is no evidence by any DEA agent that the sample received from the police officer was manufactured outside the United States.

Franzosa did not state where the sample quaalude was manufactured. In addition thereto, the expert readily admitted that his sample collection, to which he compared confiscated samples, did not contain samples from all illicit laboratories in the United States. Further, evidence offered by the government on the charges of importation of marijuana and quaaludes which were seized on the same aircraft consisted of the words "This Side Up" in Spanish on the boxes in which the quaaludes were found, and two batteries

labelled in Spanish, but with no indication of origin.

ARGUMENT

I. CO-DEFENDANTS REPRESENTED BY THE SAME RETAINED COUNSEL AND CHARGED WITH CONSPIRACY ARE ENTITLED TO A NEW TRIAL WHEN THE TRIAL COURT FAILS TO CONDUCT AN INQUIRY WITH RESPECT TO THE JOINT REPRESENTATION OF THE CO-DEFENDANTS AS MANDATED BY F.R. Cr. P. 44(c).

F.R. Cr. P. 44(c), effective 1 December 1980, mandates that whenever co-defendants are represented by the same retained counsel, the trial court shall conduct an inquiry with respect to such joint representation. The trial of the co-defendants commenced on 23 February 1981, some thirteen months after the effective date of F.R. Cr. P. 44(c). The evidence is undisputed that no inquiry was made by either a magistrate or the trial judge prior to or during the trial of this case. Petitioner

asserts the language of the Rule is mandatory and squarely places the burden of initiating and conducting the inquiry concerning joint representation of co-defendants upon the court.

The underlying purpose of the enactment of the mandatory inquiry by the Court with respect to the joint representation of co-defendants by the same retained counsel pursuant to F.R. Cr. P. 44(c) was to establish a procedural hurdle in order to eliminate potential post-conviction claims by either defendant that joint representation deprived the accused of his Sixth Amendment right to effective assistance of counsel. To ignore this hurdle and fail to apply a per se rule of reversal in the absence of an inquiry by the court, is to reopen the

floodgate of post-conviction claims of ineffective assistance of counsel.

After reading the decision by the United States Court of Appeals for the Fourth Circuit in the case sub judice, one would conclude this burden rests not with the court but rather with the trial counsel and the defendants themselves. A reading of the Rule clearly indicates the contrary. It is expressly noted in the notes of the Advisory Committee on F.R. Cr. P. 44(c) that even the most diligent attorney may be unable to detect a potential conflict that arises due to the joint representation of co-defendants. Frequently, as expressed in United States v. Carrigan (concurring opinion), "most counsel must operate somewhat in the dark and feel their way

uncertainly to an understanding of what their clients may be called upon to meet upon a trial." 543 F.2d 1053, 1058 (1976). Rule 44(c) further mandates that the trial court, not the trial attorney or defendants, has a continuing obligation throughout the course of the trial to monitor any potential conflict of interest. A less demanding rule will not adequately protect each defendant's Sixth Amendment right to effective assistance of counsel. Moreover, to ignore this rule is to undermine the very purpose for which the rule was drafted.

Courts in numerous jurisdictions have been quick to note that "[i]n conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the

prosecution may, and sometimes do, operate unfairly against an individual defendant it is especially important that he be given the benefit of the undivided assistance of his counsel without the court's becoming a party to encumbering that assistance." Glasser vs. United States, 315 U.S. 60, 76, 62 S. Ct. 457, 474 (1942). With this premise in mind, Rule 44(c) of the Federal Rules of Criminal Procedure was drafted.

Prior to the enactment of Rule 44(c) numerous courts grappled with the chilling effect of dual representation in fact patterns analogous to the case sub judice. See Cuyler vs. Sullivan, 446 U.S. 335, 100 S. Ct. 1708 (1980); United States vs. Lauriw, 568 F.2d 98 (8th Cir. 1977). The issue of post-conviction appeals asserting

ineffective assistance of counsel previously hinged on whether the defendant was actually prejudiced by dual representation. With the passage of Rule 44(c) the emphasis clearly shifted requiring a per se rule of reversal when the trial court fails to shoulder its responsibility and conduct the necessary inquiry mandated by Rule 44(c).

Failure to reverse a conviction of a co-defendant represented by the same retained counsel absent an inquiry pursuant to Rule 44(c) is to circumvent the very purpose and spirit of the Rule. Rule 44(c) is designed to protect those least able to protect themselves by placing a reasonable burden on those charged with the responsibility of seeing that defendants get effective assistance of counsel. In order

to provide for a prompt disposition of criminal cases and avoid the numerous appeals premised on ineffective assistance of counsel, the trial court must, in accordance with Rule 44(c), conduct an inquiry when defendants are represented by the same retained counsel. It is essential that the Supreme Court of the United States invoke a per se rule of reversal when the trial court fails to comply with the provisions of Rule 44(c). For the foregoing reasons, it is respectfully submitted that the trial court's failure to comply with the provisions of Rule 44(c) requires a reversal of the conviction of the defendant.

II. THE EVIDENCE OFFERED AT THE TRIAL OF THE DEFENDANT WAS INSUFFICIENT TO SUPPORT THE CONVICTION FOR IMPORTATION OF METHAQUALONE.

The indictments upon which the defendants stand convicted allege that methaqualone and marijuana found on the Lodestar plane were imported into the United States from Colombia, South America. In support of this allegation, the government offered the expert testimony of a forensic chemist.

The essence of the chemist's testimony was not that the methaqualone tablets found on the plane were imported from or manufactured in Colombia, South America. Rather, the testimony of the chemist indicated that the methaqualone tablets seized in this case were manufactured by the same stamping machine which manufactured a methaqualone tablet sent to the

Drug Enforcement Administration laboratory in 1979 by a DEA agent in Colombia. To further complicate the matter, the DEA agent obtained the sample from a police officer. The government presented no evidence tending to show that this common stamping machine was situated in Colombia or a point outside the territorial limits of the United States.

The essential element of the crime of importation of a controlled substance is proof that a transfer of contraband occurred from a point outside the territorial limits of the United States to a destination point inside the United States, 21 U.S.C. 952. The testimony of the chemist tended to prove only one premise: that a methaqualone tablet of unknown origin

"matched" the methaqualone tablets seized from the Lodestar aircraft. This testimony on the issue of importation clearly falls short of standard for assessing the sufficiency of the evidence as espoused in Jackson v. Virginia 443 U.S. 307 (1979). Furthermore, the testimony of Franzosa was of no probative value on the issue of whether the transfer of the quaaludes occurred from a point outside the United States to a destination point inside the United States.

Other evidence offered in support of the importation convictions include the words "This Side Up" in Spanish on the boxes in which the quaaludes were discovered, and two batteries found in a flashlight which had a label printed in

Spanish including the words "Union Carbide Corp. U.S.A." Considering all this evidence in a light most favorable to the prosecution, the defendant respectfully submits a rational trier of fact could not have found importation beyond a reasonable doubt.

These facts are absolutely too speculative to allow a jury to pass upon them. This is particularly true in our present society, where millions of Spanish-speaking people live and where countless products are manufactured and distributed in this country for their use and consumption. The government offered no evidence with respect to the capacity of the airplane to import from outside the country.

In United States v. Meyer, 432 F.2d 1000 (9th Cir. 1970), the defendant was charged with smuggling sodium seconal capsules into the Unites States. Four boxes containing the capsules were found bearing the label "Mexico, D.F." On appeal, the Ninth Circuit held there was insufficient evidence to support the conviction. "Whether the boxes contained the seconal capsules when brought into the country and whether the seconal capsules were illegally imported are matters of pure conjecture." 432 F.2d 1000,1001.

The United States Court of Appeals for the Fifth Circuit reiterated the absolute necessity for the government to establish a viable connection between the defendant and the mode of entry allegedly used to bring

the contraband into the United States in order to support a conviction for importation. See United States v. Maslanka, 501 F.2d 208 (5th Cir. 1974), United States v. Foto, 591 F.2d 1091 (5th Cir. 1979). No such viable connection was established by the evidence in the case sub judice.

In United States v. Carrion, 457 F.2d 200 (9th Cir. 1972), the government presented the following evidence on the issue of importation when several hundred pounds of marijuana were discovered on an aircraft: (1) the boxes containing the marijuana had Spanish writing on them, (2) one defendant had a map of Mexico and a matchbook bearing an advertisement for a Mexican motel in his bag; (3) and another defendant carried in his wallet a slip of paper

bearing Spanish words. In addition thereto, the prosecution showed sufficient time had elapsed since the leasing of the aircraft to complete a round trip flight to Mexico.

The Court of Appeals for the Ninth Circuit held this evidence was insufficient as a matter of law to support a conviction for the importation of marijuana from Mexico. The focal point of the reversal hinged on the fact there was no evidence the defendant's plane had been seen in Mexico, and no circumstantial evidence tending to show the defendant's airplane had been in Mexico.

In the case sub judice the government alleged the contraband was brought into the United States by plane from Colombia.

However, no evidence was presented that the plane seized with the marijuana and methaqualone had the capacity to fly the long distance between Colombia and Long Beach, North Carolina. No flight charts were discovered on board the plane denoting the airways between Colombia and the United States. Further, there was no evidence whatsoever that the airplane carrying the contraband had been seen in Colombia, and no circumstantial evidence tending to show the airplane had been in Colombia. The absence of any such evidence accentuates the weakness of the charges of importation.

The irony of the published decision of this case by the United States Court of Appeals for the Fourth Circuit is the court readily admitted the insufficiency of the

evidence to support a conviction for importation of marijuana but concluded, in what is seemingly a contradiction, the evidence was sufficient to support a conviction for importation of methaqualone when all the contraband was found on the same aircraft. It would seem that the Court of Appeals considered the evidence on the charge of importation of marijuana and the charge of importation of methaqualone mutually exclusive. Defendant respectfully submits there is no rational basis for the Court of Appeals to have reached two contradicting decisions based upon the same evidence. The only additional evidence offered with respect to the charge of importation of methaqualone as opposed to the charge of importation of marijuana was

the testimony of the forensic chemist. Defendant reiterates the testimony of the chemist was of no probative value on the issue of importation.

To follow the logic of the Court of Appeals would lead one to the conclusion that because a nationalist Chinese, Hu Chang, was flying the aircraft that landed at the Long Beach Airport, the contraband was imported from China. Therefore, it is respectfully submitted that this Court reverse the conviction of the defendants for the importation of methaqualone and the aiding and abetting of the importation thereof due to the insufficiency of the evidence.

CONCLUSION

For the various legal reasons set forth in this brief, both individually and collectively, it is request that this petition for certiorari be granted.

By: James L. Nelson
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true copy of the foregoing Petition for Certiorari to the following:

The Honorable Samuel T. Currin
United States Attorney
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The Honorable James L. Blackburn
Special Assistant U. S. Attorney
Post Office Box 1507
Raleigh, North Carolina 27602

This 27th day of August, 1982.

Catherine Johnson

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NOS.
81-5133, 81-5134,
81-5135, 81-5136,
81-5137, 81-5138

UNITED STATES OF AMERICA,

Appellee

v.

ERIC ARIAS, EARL LAVELL FAIRCLOTH,
GERALD E. MICHAEL, IDAEL MANUEL
JIMINEZ-MORA, LATEN GENE REAVES,
and ROGER SUGGS,

Appellants

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. W. Earl Britt, District Court Judge.

Argued: January 7, 1982
Decided: May 27, 1982

Before WIDENER, HALL and CHAPMAN, Circuit Judges.

Joseph B. Cheshire, V (Barbara A. Smith, Cheshire & Manning, on brief) for Arias & Jiminez-Mora; James L. Nelson (Nelson, Smith & Hall on brief) for Reaves; (Eugene Boyce, Lacy M. Presnell, III, on brief) for Suggs; (John Richard Newton on brief) for Faircloth; (Renn Drumm, Jr., on brief) for Michael; (W. Osborne Lee, Jr., Lee and Lee, on brief) for Reaves; James L. Blackburn, Special Assistant U. S. Attorney (Samuel T. Currin, U. S. Attorney, on brief) for Appellee.

WIDENER, Circuit Judge:

Eric Arias, Earl Faircloth, Gerald Michael, Idael Jimenez-Mora, Laten Reaves and Roger Suggs were convicted in the United States District Court for the Eastern District of North Carolina on the three counts for which they were tried. The three counts were conspiracy to import and to possess with intent to distribute methaqualone (quaaludes) and marijuana, in violation of 21 U.S.C. §§ 841(a), 952(a),

960(a)(1) and 963, and 18 U.S.C. § 2; importing the methaqualone and aiding and abetting the importation thereof, in violation of 21 U.S.C. §§ 952(a) and 960(a)(1), and 18 U.S.C. § 2; and importing the marijuana and aiding and abetting the importation thereof, in violation of 21 U.S.C. §§ 952(a) and 960(a)(1), and 18 U.S.C § 2. We affirm in part, but reverse on one count of the convictions.

In the early morning hours of April 10, 1980, a Lodestar plane loaded with 3,310 pounds of marijuana and 867 pounds of quaaludes landed at an airport near Southport, North Carolina (called variously Southport and Long Beach Airport). A woman living by the airport had just before called the local police to say that she had

seen and heard a plane having trouble landing.

In response to the call, Officer Pearson and Cadet Officer Russell of the Southport Police Department were sent to investigate. They testified that they approached the airport at a high rate of speed and, because of that, were forced to drive past the entrance, turn around and come back. They stated that they saw three vehicles at the airport entrance as they passed, but the vehicles were gone when they got back. The vehicles were a white Dodge van, a green and white fuel truck and a light-colored Buick Electra 225. The officers proceeded to look in the vicinity for the three vehicles they had seen, and spotted taillights in the distance and

followed them. They belonged to the white Dodge van. Pearson radioed to Deputy Joyner of the Brunswick County Sheriff's Department to take over pursuit of the van. Joyner eventually stopped the van. Its occupants were identified as appellants Arias, Michael, Jimenez-Mora and Suggs. A consent search of the van yielded nothing.

Meanwhile, Pearson and Russell turned back toward the airport in search of the other two vehicles. They came across the Buick and the fuel truck traveling in the opposite direction. The officers turned and followed the fuel truck. They continued to follow the truck until a Deputy Campbell was requested to take over. Pearson and Russell returned to assist Joyner, who had stopped the white van.

Campbell turned onto the road where Pearson had last seen the fuel truck. A mile and a half up the road, he came across the fuel truck, the Buick, and another car stopped in the road. The fuel truck, the Buick, and another car stopped in the road. The fuel truck and Buick were occupied by three co-defendants whose cases are not before us on appeal. The owner of the fuel truck and Buick told Campbell that he had been called to the airport to refuel an airplane, which had never arrived. Campbell was given permission to search the fuel truck and the Buick. He found a canvas bag containing nine or ten white lights, some of which were still on.

While Campbell was questioning the occupants of the vehicles, he spotted two

planes circling. He advised Pearson that he (Pearson) should go to the airport, and he later went there himself. The officers found the Lodestar plane on the runway with one engine running. Since no one was in the plane, one of the officers entered it to turn off the engine. He spotted plastic-wrapped bales of marijuana and boxes that seemed to contain tablets. The officers then contacted the Drug Enforcement Administration (D.E.A.) and customs officers.

Meanwhile, Officer Gates of the nearby Ocean Isle Police Department was dispatched to the Ocean Isle airport, after an air traffic controller reported that he had seen a plane flying in that direction. Officer Gates himself had observed a small,

single-engine plane take off from Ocean Isle airport between an hour and two hours earlier. He had watched the plane as it intercepted a larger plane, and the two planes flew together toward Southport. When Gates arrived at Ocean Isle airport, a small plane was landing. Appellants Reaves and Faircloth got out of the plane and walked to their car. Gates engaged them in conversation until a back-up officer arrived. This officer, Chief of Police Gurganeous, asked to see Faircloth's pilot's license and plane registration. Because Faircloth was unable to remove the registration from the plane, Gurganeous looked in to record the information contained therein. He observed that one of the four radios was set at a frequency of

122.5. The radio in the Lodestar plane that had landed at Long Beach airport was set at the same frequency, though this frequency is not normally used by planes in the vicinity of Ocean Isle and Long Beach.

The first issue raised on appeal is the claim that the rights of Reaves and Suggs were violated because they were represented at trial by the same attorney. Their principal claim in this regard is that since FRCrP 44(c) requires the court to "inquire with respect to such joint representation and. . .personally advise each defendant of his right to effective assistance of counsel, including separate representation," the mere failure of the district court to inquire and advise as set out in the rule makes necessary a reversal

of the convictions. Admittedly, Reaves and Suggs were represented at trial by the same retained attorney, and, admittedly, no inquiry was made by the court. Reaves and Suggs were arraigned September 17, 1980. FRCrP 44(c) became effective December 1, 1980, and the trial in the case was February 23, 1981. Nothing was said to the district court about Rule 44(c) at any time before the trial, during the trial, or even after the trial. The first time Rule 44(c) was mentioned in this proceeding was in the brief on appeal.

We are of opinion that the mere failure of the district court to inquire and advise in accordance with FRCrP 44(c) does not make necessary a reversal. "The failure in a particular case to conduct a

Rule 44(c) inquiry would not, standing alone, necessitate the reversal of a conviction of a jointly represented defendant." Notes of Advisory Committee on Rules, reprinted in West's Federal Rules of Criminal Procedure, etc., 1981 Ed., p. 117, 121. We decline to impose a rule of per se reversal contended for by the defendants.

Reaves and Suggs claim they were prejudiced by being represented at tiral by the same attorney because such joint representation served to link them together in the eyes of the jury in this conspiracy case. This contention is obviously without merit, there being nothing in the record to support it. The same claim of guilt by association is made by the remaining

appellants, which is likewise without merit for the same reason.

The only claim of prejudice worth mention on account of the joint representation is with respect to the testimony of a conversation Reaves had with one of the government agents. While the claim itself may be somewhat attenuated, we do not find it necessary to pass upon its validity because the matter was never brought to the attention of the district court. The conversation was admitted without objection, and no motion was made to strike it out. No difficulty occasioned by that testimony was mentioned to the district court. The very matter of joint representation, as we have related before, was never mentioned to the district court.

Even at sentencing, when Suggs had a different attorney from the one who had represented him at tiral, the matter was not brought to the district court's attention. We will not ordinarily notice error unless the matter has been brought to the attention of the district court. McGowan v Gillenwater, 429 F.2d 586 (4th Cir. 1970). In this case, in which the mere violation of the rule is not reversible error, when the matter has not been brought to the attention of the district court, and when it is mentioned for the first time on appeal, we think it is not plain error, and decline to reverse the case or to inquire further into the

matter under such circumstances. See FRCrP 52(b).[1]

Appellants also contend that the van in which Michael, Arias, Suggs and Jimenez-Mora were riding was illegally stopped and searched. Because no evidence was seized or introduced into evidence as a result of the search of the van, we do not decide whether the van was stopped illegally. Appellants claim that the identity of the van's occupants would never have been discovered had the van been stopped. While

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1. This opinion should not be considered a reflection on any of the trial attorneys for not objecting to the joint representation in the district court. The matter appears to be an afterthought.

this may be true, the identity of defendants is not suppressible under the exclusionary rule. The Supreme Court has held that the government is not prevented from bringing a defendant to trial merely because he was identified as a result of a false arrest, and we think that case controls here. United States v. Crews, 445 U.S. 463 (1980).

Error is assigned to admitting the testimony of the prosecution's expert witness. Dr. Franzosa, a forensic chemist and ballistics expert employed by the D.E.A., testified that the compared the quaaludes which were seized from the plane with a sample quaalude pill that he had received from an agent in Colombia. In his opinion, the seized quaaludes had been made

by the same machine as the tablet from Colombia, and they could not have been made by any of the legitimate or illicit laboratories in the United States from which the D.E.A. had samples. The D.E.A. had samples from all legitimate laboratories in this country. Appellants protest that this testimony should not have been admitted because the government failed to establish a chain of custody for the sample sent from Colombia. In effect, they say, Dr. Franzosa's testimony was based on hearsay as to the origin of the sample tablet. Under FRE Rule 703, however, an expert may base his testimony upon the type of hearsay he would normally rely upon in the course of his work. The sample pill was sent to Dr. Franzosa by a D.E.A. agent in Colombia

in a heat sealed container by diplomatic pouch with the agent's identification thereupon. D.E.A. forensic scientists rely upon agents in the field to submit samples and to establish their authenticity as is shown by the fact that the pill in question was catalogued and kept for sample use by the D.E.A. Thus, Dr. Franzosa's reliance on the agent's report that the control sample was obtained in Colombia does not make his testimony inadmissible; rather, it is a factor to be considered by the jury in assessing the weight of his testimony, for it is not the fact of whether or not the sample pill came from Colombia which is at issue, the issue is whether Dr. Franzosa could use the sample pill in forming an

opinion. We think its use was permissible under FRE 703.

Also at issue is whether the evidence as sufficient to support the convictions for importation. The standard applied by this court in assessing the sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); United States v. Shaver, 651 F.2d 236, 238 (4th Cir. 1981). The essential elements of importation that the government had to prove beyond a reasonable doubt are that the drugs were imported from outside the United States and that the defendants

imported the drugs or aided and abetted in their importation.

The evidence which the government offers as tending to support the convictions for importation includes the testimony of Dr. Franzosa concerning the origin of the quaaludes; the words "This Side Up" in Spanish on the boxes in which the quaaludes were found; two batteries with Spanish writing, but no indication of origin, found in a flashlight in the Lodestar plane; and two telephone calls to Colombia made from a phone billed to Arias several days before the events of April 10, 1980.

The 3:30 a.m. airport possession of hundreds of pounds of Colombian quaaludes, as well as the Spanish-labeled flashlight

batteries, must be an unusual occurrence in Southport, North Carolina and is entitled to more weight than courts have given to possession of similar items near the Mexican border. See United States v. Miller, 589 F.2d 1117, 1137 (1st Cir.), cert. denied, 440 U.S. 958 (1978). The court in Miller distinguished cases from the Fifth and Ninth Circuits, including United States v. Maslanka, 501 F.2d 208 (5th Cir. 1970), United States v. Carrion, 457 F.2d 200 (9th Cir. 1972), and United States v. Meyer, 432 F2d 1000 (9th Cir. 1970), partially on the infrequency of possession of Columbian marijuana in Maine compared with possession of foreign items common in the Southwest. Id.

We think the record supports an inference that appellants either imported the quaaludes or aided and abetted in their importation.

On the other hand, the convictions for importation of marijuana must be reversed for lack of evidence that the marijuana was imported. There is insufficient evidence in the record to connect the marijuana to a place outside the United States.

Count I of the indictment, the conspiracy count, actually consists of four items, conspiring to import quaaludes, conspiring to import marijuana, conspiring to possess quaaludes with intent to distribute, and conspiring to possess marijuana with intent to distribute. The guilt of the defendants may be established by any

proof of one of the four items just mentioned. Turner v. United States, 396 U.S. 398, 420 (1970). Three of the four items have been proved: conspiring to import quaaludes, conspiring to possess quaaludes with intent to distribute, and conspiring to possess marijuana with intent to distribute. Conspiring to import marijuana has not been established.

Count II of the indictment, importing the quaaludes and aiding and abetting the importation thereof, has been established by the evidence.

Count III of the indictment, importing the marijuana and aiding and abetting the importation thereof, has not been established by the evidence.

Accordingly, we affirm the convictions of the defendants on Counts I and II. Their convictions on Count III must be vacated.

Some part of the guilt of the defendants may be laid to the importation of marijuana which was a part of the charge in Count I and the essence of the charge in Count III. The sentences of the defendants consist variously of consecutive terms on all counts; consecutive and concurrent terms on different counts; a consolidated sentence; fines for some; § 4205(b)(2) sentences; and special parole terms for some. For these reasons, we believe that, although the convictions of all of the defendants on Counts I and II are affirmed, their sentences on Counts I and II must be

vacated and that they ought to be resentenced by the district court.

On remand, the district court will vacate the convictions of the defendants on Count III and resentence the defendants on Counts I and II.

We have examined the other assignments of error presented and are of opinion they are without merit.

AFFIRMED IN PART;
REVERSED IN PART;
and REMANDED WITH
INSTRUCTIONS.

HALL, concurring in part and dissenting in part:

While I concur with most of the majority opinion, I dissent from the reversal of the convictions for importation of marijuana.

In determining the sufficiency of the evidence to support the convictions, we must allow the government the benefit of all reasonable inferences from the facts proven. Jackson v. Virginia, 443 U.S. 307 (1979); United States v. Grow, 394 F.2d 182 (4th Cir.) cert. denied, 393 U.S. 840 (1968).

In this case, the marijuana was found on board the Lodestar together with boxes of quaaludes. As Judge Widener has

outlined, the evidence indicated that the quaaludes were imported from Colombia. From this evidence, the jury could have inferred beyond a reasonable doubt that the rest of the Lodestar's cargo, including the marijuana, was similarly imported.

Accordingly, I would affirm the convictions for importation of the marijuana.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NOS. 81-5133
81-5134, 81-5135,
81-5136, 81-5137,

UNITED STATES OF AMERICA

Appellee

v.

ERIC ARIAS, EARL LAVELL FAIRCLOTH,
GERALD E. MICHAEL, IDAEL MANUAL
JIMINEZ-MORA, LATEN GENE REAVES,
and ROGER SUGGS

Appellants

ORDER

There being no request for a poll of the court on the petition for rehearing en banc,

It is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Hall and Judge Chapman.

/s/ Judge Widener
For the Court

21 U.S.C. 952(a).
IMPORTATION OF CONTROLLED SUBSTANCES:

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of tile II, or any narcotic drug in schedule III, IV, or V of title II, except that—

(1) such amounts of crude opium and coca leaves as the Attorney General

finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States——

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 303 [21 USCS § 823],

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.